BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding	))))	GN Docket No. 93-252

REPLY COMMENTS OF SOUTHWESTERN BELL CORPORATION

Comes now Southwestern Bell Corporation (SBC) and on behalf of its operating subsidiaries files these comments in accordance with the Second Further Notice of Proposed Rulemaking ("FNPRM II") released by the Federal Communications Commission ("FCC") herein on July 20, 1994.

Of the twenty or so parties filing comments in this proceeding, only one party disagreed with SBC's conclusion that management agreements which do not in fact or by legal action transfer control of the underlying spectrum license to a third party should not be attributed to the third party for purposes of spectrum allocation caps and designated entity qualification. The arguments of that one dissenter, Columbia PCS, Inc. ("Columbia"), are flawed, however, and should be rejected by the Commission, as SBC will detail below. Further, as the comments of every other party make clear, the reasons for permitting unhindered use of such management contracts are compelling and will further the Commission's purposes in creating the designated entity entitlements as well as speeding the deployment of PCS services. The same arguments can and have been made to support the use of joint venture and joint marketing arrangements. Therefore, the Commission should not adopt the proposals contained in the FNPRM II with regard to management, joint venture and joint marketing contracts.

I. MANAGEMENT AND JOINT MARKETING AGREEMENTS THAT DO NOT RESULT IN TRANSFER OF CONTROL SHOULD NOT BE TREATED AS ATTRIBUTABLE INTERESTS FOR PURPOSES OF THIS PROCEEDING.

A. Public Policy Supports The Use Of Management Contracts, Especially By Designated Entities.

The Initial Comments filed herein overwhelmingly opposed the FCC's proposal to treat management agreements which do not de jure or de facto transfer control as an attributable interest for defining a designated entity or when applying PCS/cellular cross-ownership and PCS spectrum aggregation limits. Virtually every segment of the industry weighed in against the proposal, from cellular carriers, cellular service resellers and related associations, through local exchange carriers, mobile satellite service providers and specialized mobile radio providers, to manufacturers and their trade associations. Some parties, such as the Rural Cellular Association and Dial Page,[1] Inc, echoed SBC's point that existing rules and caselaw in the fields of antitrust and corporate governance more than adequately protect against the possibility that entities with non-equity relationships to CMRS licensees will wrest control from the licensee. Indeed, Nextel Communications, Inc.[2] (the ESMR behemoth) noted that a management agreement by definition confers no ownership interest on the managing party.

A significant portion of the initial commenters objected to the proposal, as did SBC, on the ground that its application would be especially burdensome for designated entities. Subjecting the management contracts of such entities

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[1] Rural Cellular Assn. at p. 5; Dial Page at p. 4.

[2] Nextel Communications, Inc. at p. 2.

to the attribution rules, argued L.L.C. ("LCC")[3] (an supplier of engineering services and specialized software and hardware for CMRS), would not enhance competitiveness, as the Commission desires,[4] but rather would decrease it by limiting the potential number of spectrum providers to those with previous and substantial experience in the field.[5] These limitations, argues LCC, will only further restrict the designated entity's access to capital markets[6] and therefore serve to perpetuate the perceived disadvantages experienced by women, minorities and small businesses that led to the creation of the designated entity privileges. SBC echoes this analysis.

Furthermore, Dial Page pointed out that its years of experience in the special mobile radio ("SMR") industry teach that management agreements can increase the number of service providers in a marketplace rather than impede vigorous competition.[7] Because those licenses were granted in such small blocks, large numbers of companies participated. Many of these companies were small operators which utilized management agreements to supplement their own technical and marketing capabilities. Therefore, use of management agreements actually

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[3] LCC at p. 5.

[4] See FNPRM II, ¶ 5.

[5] LCC, p. 5.

[6] See also PlusCom at p. 2, arguing that expansion of the Intermountain test in the nascent CMRS industry would place undue restrictions on the ability of designated entities to creatively attain financial assistance.

[7] Dial Page at p. 7.

facilitated competition in the SMR business.[8] As in the nascent SMR world, smaller PCS parties, particularly minorities and entrepreneurs, could encounter substantial difficulty in performing all functions needed to operate such systems if the use of management agreements would jeopardize their preferred status.[9] These comments support SBC's proposal that so long as control is not transferred either de jure or de facto, management agreements pose no competitive threat.

Other commenters suggest that the FCC's proposal unnecessarily adds further uncertainty and holocausts of agency overload to the fast-paced struggle to become a PCS provider.[10] While the precepts of In re Intermountain Microwave[11] are relatively easy to understand, the welter of details which the Commission must define as permissible in a management agreement to avoid attribution are not likely to be so straightforward. For example, what access can the managing company have to customer lists--three months? Six months? On premises only? Input into databases? etc. The responsibilities which might be covered by a management agreement are as numerous as the functions necessary to operate a telecommunications business. As Dial Page pointed out,[12] this Commission simply does not have

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[8] Id., see also Nextel at p. 3.

[9] See also Nynex, p. 4, arguing that management agreements allow licensees to operate more efficiently, especially designated entities, which may be in greater need of such assistance to compete.

[10] Dial Page at p. 8.

[11] 24 Rad. Reg. 983 (1963).

[12] Dial Page at p. 8.

the luxury of time or money to second-guess management decisions. Doing so flies squarely in the face of the Commission's previous recognition that there is no need for stringent regulation of CMRS.[13] In short, as PCC Management Corp. put it, management agreements are "an essential component of today's telecommunications environment." Therefore, SBC agrees that "...the FCC must adopt control and real-party-in-interest criteria which are consistent with today's business practices."[14]

B. The Commission Need Not Forbid Or Otherwise Hamper The Outsourcing Of Any General Management/General Contractor Functions In Order To Preserve Competition.

Columbia purports to understand the urgency of allowing designated entities to acquire management expertise through contractual arrangements and urges the Commission to "narrowly define management contracts" which would not trigger attributable interest rules, citing concerns of possible "abuse" of the relationship.[15] SBC concurs with Columbia that the licensee must retain the right to determine and carry out policy decisions if it wants to establish that control of the license has not been transferred to a third party. However, the fact that a management or joint venture agreement may govern operations will not affect the licensee's ultimate right to direct strategies and

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[13] Pacific Bell Mobile Services at 7, citing the Second Report and Order herein, 9 FCC Rcd. 1441, ¶¶ 174, 180-182 (1944).

[14] PCC Management Corp. at pp. 2, 3. SBC supports PCC Management's suggestion that the Commission define what sort of management agreements comply with Intermountain before ruling them attributable.

[15] Columbia at p. 3.

marketing options.[16] In fact, if the management agreement does so, it violates the prohibition of Intermountain against alienating "determination of and the carrying out of policy decisions." It also would constitute a transfer of control and is unlawful in any event.[17] On the other hand, as noted above, a management agreement which does not "cross the line" effectively allows a licensee to employ a set of qualified managers.[18]

Columbia further argues that allowing general management contracts creates the risk of bestowing a competitive benefit upon the management company because it would create access to sensitive marketing information. As SBC noted in its Initial Comments, however, existing antitrust law should serve as a strong deterrent to any attempt to reduce competition in a

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[16]Columbia's argument that Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42 and Telephone and Data Systems, Inc., 19 F.3d 655 (D.C. Cir 1994) demonstrate that Intermountain should be revisited is completely off the mark. While it certainly is true that wireless services are vastly different today than in 1963, the seven criteria of Intermountain have been applied many times with comparative ease. See, e.g., 24 Rad. Reg. 983 (1963) (Lexis provided over 35 uses of Intermountain in FCC orders.) The two cases cited by Columbia amount to two attempts, inadequate as it turns out, by the FCC to explain why one management arrangement was acceptable and the other was not. Such difficulties in order drafting do not rise to the level of requiring overhaul of the principles, nor did the court in either case even hint that the agency do so.

[17]See In re Intermountain, supra at p. 984.

[18]Columbia's suggestion that the FCC should require management contracts to be priced at fair market value resulting from arm's length negotiations is insulting to the designated entities in that it implies that these companies cannot protect the value of their investment from incursion by the managing company. Further, such an exertion of administrative effort is an odious micromanagement of business by government and should not be attempted.

wireless market by obtaining (illegal) de facto control of an in-region wireless property as the result of an over-zealous management agreement.[19] On the other hand, management agreements that do not result in de facto control of an "in-region" property do not invoke the concerns raised by Columbia and should not be of interest to the FCC. Columbia's related concern regarding the sharing of market sensitive information is likewise misplaced. Both antitrust laws and state rules on corporate governance impose a fiduciary responsibility on owners and key managers to protect company assets, including market sensitive information.[20]

II. JOINT MARKETING AGREEMENTS SHOULD ALSO BE PERMITTED AND SHOULD NOT TREATED AS AN ATTRIBUTABLE INTEREST.

Despite the Commission's concern that joint marketing agreements might provide competitors access to information, or have other anticompetitive effects that could impede vigorous competition in the CMRS market,[21] no commenting party agreed. SBC concurs with this universal conclusion that lawful joint marketing agreements will not jeopardize competition. As an initial observation, SBC agrees with GTE Service Corp. that joint marketing arrangements can be structured so as to avoid the sharing of information between competitors.[22] SBC argued in its Initial Comments (at p. 6) that existing rules are more than sufficient to ensure that the public will receive the full

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[19] SBC Initial Comments at p. 6.

[20] Id.

[21] FNPRM II at ¶ 6.

[22] GTE at p. 10. Indeed, antitrust law virtually requires it.

benefits of a competitive market. The Cellular Telecommunications Industry Association[23] rightfully concluded that adding such non-equity relationships to the broadband PCS attribution rules would risk delaying the introduction of PCS and denying PCS licensees access to the expertise needed to successfully operate their systems.[24]

The Commission recognized in the FNPRM II that the economic advantages of such arrangements may be beneficial to both the licensees and their subscribers. It is clear that such agreements stand to benefit the public without raising the anti-competitive concerns voiced by the Commission.

III. SERVICE MARK, TRADEMARK AND INTEROPERABILITY AGREEMENTS SHOULD NOT BE CONSIDERED ATTRIBUTABLE INTERESTS FOR PURPOSES OF THIS PROCEEDING.

In its Initial Comments, SBC urged the Commission to clarify that any rule it might adopt to attribute ownership based upon joint marketing arrangements does not encompass service mark and trademark licensing agreements, intellectual property agreements and interoperability agreements.[25] Interoperability agreements, such as the IS-41 "backbone" agreement, include virtually every cellular carrier. These agreements promote the Commission's goal for seamless national service through automatic call delivery and inter-system hand off. The Commission cannot mean either to exclude all of these carriers or to dismantle the progress towards seamless service made possible by backbone

[23] CTIA at pp. 4, 5.

[24] See also PCC Management Corp. at p. 3.

[25] SBC at pp. 8, 9.

networks. SBC was not alone in this position and no commenting party raised this as an issue. Vanguard Cellular Systems, Inc. ("Vanguard") noted that Cellular One® and similar arrangements, such as MobiLink℠ (the licensing arrangement that now exists among wireline cellular carriers), do not have the same implications for competition as, for instance, joint marketing by two or more radio stations in a single market. As Vanguard explains, joint marketing arrangements in the broadcast context are considered attributable because the parties cover the same service area. Cellular providers who enter into these arrangements, however, cannot serve in each other's area.[26] The Cellular One® agreement is much more analogous to network affiliation in broadcasting. Since the Commission does not apply its attribution rules to broadcast stations that are linked only by a common network affiliation, it should not stretch its attribution rules for the commercial mobile radio services to encompass arrangements like Cellular One®.[27]

SBC's Initial Comments, like those of Vanguard, reminded the Commission of the myriad public benefits of arrangements like Cellular One®. As indicated by Vanguard, the economies created by joint marketing and advertising allow Cellular One® carriers to charge lower prices. Branded services such as Cellular One® and MobiLink℠ make it easier for customers to understand the benefits of and distinctions between different carrier groups. On the other hand, concerns regarding cross-marketing of services that might arise from joint marketing

[26] Vanguard at p. 4.

[27] Id.

arrangements do not apply to Cellular One® since Cellular One® is strictly a licensing arrangement coupled with certain quality standards to help insure seamless functionality in the A band cellular markets. These standards create significant customer value through consistent system quality, identical dialing patterns (such as the same number to reach customer service in each market) and similar technical standards. Clearly, the aforementioned benefits associated with such arrangements outweigh any potential risks voiced by the Commission.

IV. CONCLUSION

While the Commission's concern about the possibility of abuse of the advantages granted to designated entities is a serious one, the vast majority of commenters agree that the risks are more than adequately managed by currently existing tools. The Commission should decline to adopt its proposed rules.

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CERTIFICATE OF SERVICE

I, Martha R. Kiely, hereby certify that copies of the foregoing Reply Comments of Southwestern Bell Corporation have been served by first class United States mail, postage prepaid, on the parties listed on the attached.

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